

STATE OF MICHIGAN
COURT OF APPEALS

FIRST INDEPENDENCE CAPITAL
CORPORATION,

Plaintiff-Appellant,

v

LISAN PROPERTIES, INC. and NANCY
MCMULLEN,

Defendants,

and

COMERICA BANK,

Defendant-Not Participating

and

MICHIGAN NATIONAL BANK,

Defendant-Appellee,

and

JAMES D. FLACK and PATRICIA A. FLACK,

Defendants-Third Party Plaintiffs-
Appellees,

and

PRIME FUNDING LTD.,

Intervening Defendant-Appellee,

and

UNPUBLISHED
June 12, 2003

No. 238826
Oakland Circuit Court
LC No. 2000-022251-CH

LAND DYNAMICS LLC,

Third Party Defendant-Appellee.

Before: Cavanagh, P.J., and Gage and Zahra, JJ.

PER CURIAM.

Plaintiff, First Independence Capitol Corporation (FICC), appeals as of right from a judgment in favor of intervening-defendant, Prime Funding LTD (Prime). We affirm.

On appeal, FICC first argues that the trial court abused its discretion in granting Prime's motion to intervene after judgment had been entered in favor of FICC. We disagree. This Court reviews a trial court's decision on a motion to intervene for an abuse of discretion. *Vestevich v West Bloomfield Twp*, 245 Mich App 759, 761; 630 NW2d 646 (2001). An abuse of discretion exists if an unprejudiced person, considering the facts upon which the trial court acted, would say there is no justification or excuse for the ruling, *Cleary v The Turning Point*, 203 Mich App 208, 210; 512 NW2d 9 (1993), or the result is so violative of fact and logic that it evidences a perversity of will or the exercise of passion or bias, *Dep't of Transportation v Randolph*, 461 Mich 757, 768; 610 NW2d 893 (2000).

We find that the trial court did not abuse its discretion in permitting Prime to intervene under MCR 2.209(B), which provides:

(B) Permissive Intervention. On timely application a person may intervene in an action

(1) when a Michigan statute or court rule confers a conditional right to intervene;
or

(2) when an applicant's claim or defense and the main action have a question of law or fact in common.

Both MCR 2.209(A)(3), regarding intervention as of right, and MCR 2.209(B)(2), regarding permissive intervention, require a "timely application" for intervention. However, "[t]here should be considerable reluctance on the part of the courts to allow intervention after an action has gone to judgment and a strong showing must be made by the applicant." *Dean v Dep't of Corrections*, 208 Mich App 144, 150; 527 NW2d 529 (1994), citing 7C Wright, Miller & Kane, *Federal Practice & Procedure: Civil* (2d ed), § 1916, p 444. Here, the order entered in FICC's favor provided that "this judgment does not resolve all of the issues in this case and does not close this case." Thus, intervention was not precluded under the court rule because the case was still pending when Prime moved to intervene.

Further, although "a trial court abuses its discretion in granting a motion to intervene after a judgment favorable to the intervenor has already been entered for the original party to the suit with whom the intervenor is attempting to align," Prime's motion to intervene followed the entry of a judgment that was not favorable to it. *WA Foote Mem Hosp v Dep't of Pub Health*, 210 Mich App 516, 525; 534 NW2d 206 (1995), citing *Dean*, *supra* at 150-151. In both *Dean*

and *WA Foote Mem Hosp*, the unfairness of intervention arose because the intervening party knew that an original party with aligned interests received a favorable ruling from the trial court. *WA Foote Mem Hosp, supra; Dean, supra*. Here, Prime moved to intervene after an unfavorable judgment, and was not in a position to acquire a favorable ruling simply by intervention alone. In addition, as noted by the trial court, several existing original parties would be prejudiced if Prime was not allowed to intervene. Specifically, the Flacks, Land Dynamics, and Michigan National would succeed to Prime's status as a bona-fide purchaser for value, irrespective of actual or constructive knowledge of the subsequently recorded judgment. See *Schulte v Detroit*, 242 Mich 152, 153-155; 218 NW 690 (1928). Therefore, the trial court did not abuse its discretion in permitting Prime to intervene under MCR 2.209(B)(2).

FICC next argues that the trial court improperly granted Prime's motion for summary disposition because Prime was not a bona-fide purchaser of the subject property. We disagree. A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A trial court's grant or denial of a motion for summary disposition is reviewed de novo. *Id.* Summary disposition is proper when, considering the documentary evidence in a light most favorable to the nonmoving party, there is no genuine issue as to any material fact on which reasonable minds could differ. MCR 2.116(C)(10); *Ritchie-Gamester v Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

MCL 565.29 provides:

Every conveyance of real estate within the state hereafter made, which shall not be recorded as provided in this chapter, shall be void as against any subsequent purchaser in good faith and for a valuable consideration, of the same real estate or any portion thereof, whose conveyance shall be first duly recorded. The fact that such first recorded conveyance is in the form or contains the terms of a deed of quit-claim and release shall not affect the question of good faith of such subsequent purchaser, or be of itself notice to him of any unrecorded conveyance of the same real estate or any part thereof.

Thus, an unrecorded conveyance of real estate is void against a "subsequent purchaser in good faith and for a valuable consideration" who first records the conveyance. See *Michigan Nat'l Bank & Trust Co v Morren*, 194 Mich App 407, 410; 487 NW2d 784 (1992). "A good faith purchaser is one who purchases without notice of a defect in the vendor's title." *Id.* "A person who has notice of a possible defect in a vendor's title and fails to make further inquiry into the possible rights of a third-party is not a good-faith purchaser and is chargeable with notice of what such inquiries and the exercise of ordinary caution would have disclosed." *Royce v Duthler*, 209 Mich App 682, 690; 531 NW2d 817 (1995), citing *Kastle v Clemons*, 330 Mich 28, 31; 46 NW2d 450 (1951). "Notice need only be of the possibility of the rights of another, not positive knowledge of those rights." *Schepke v Dep't of Natural Resources*, 186 Mich App 532, 535; 464 NW2d 713 (1990).

Prime admits that it had notice that FICC may have had a mortgage on the subject property. However, Prime argues that after receiving notice of a possible defect, it made sufficient inquiry into possible defect. The duty to further inquire is defined as:

“If [a person] has knowledge of such facts as would lead any honest man, using ordinary caution, to make further inquiries, and does not make, but on the contrary studiously avoids making such obvious inquiries, he must be taken to have notice of those facts, which, if he had used such ordinary diligence, he would readily have ascertained. . . . But he can not be bound to do more than apply to the party in interest for information, and will not be responsible for not pushing his inquiries further, unless the answer which he receives corroborates the prior statements, or reveals the existence of other sources of information.” *Cherry River Nat Bank, Richwood, W Va, v Wallace*, 329 Mich 384, 389-390; 45 NW2d 332 (1951), quoting *Converse v Blumrich*, 14 Mich 109, 120 (1866) (internal citations omitted).

Here, the trial court held:

Prime’s president Aaron Jade made several attempts to view the mortgage on the property alleged by FICC. It seems reasonable to the Court that if such a mortgage existed, that FICC would have produced a copy of it to demonstrate FICC’s prior interest to Prime. A copy of the mortgage was never supplied to Mr. Jade as he requested, and the request for subordination was not responded to by Mr. Eisenburg. Mr. Jade also testified that when he confronted Mr. Baumhaft about there being no recorded mortgage, Mr. Baumhaft stated that attorney Harris screwed up because he didn’t record it and indicated to Mr. Jade that there was no mortgage.

The record supports the trial court’s statements. Though FICC presented evidence that conflicted with the trial court’s findings, this evidence was not presented in response to Prime’s motion. Our review is limited to the evidence presented to the trial court at the time the motion was decided. *Sprague v Farmers Ins Exch*, 251 Mich App 260, 265; 650 NW2d 374 (2002). Since there is undisputed evidence that Jade applied to the alleged party in interest, FICC, for information regarding its alleged mortgage, and received no response to his request to produce a copy of the mortgage, Jade had no responsibility to further inquire. *Cherry River Nat Bank, Richwood, W Va, supra* at 390. Therefore, the trial court properly granted Prime’s motion for summary disposition because the evidence did not present a genuine issue of material fact that Prime was a bona-fide purchaser of the subject property.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Hilda R. Gage
/s/ Brian K. Zahra